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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|------------------------------|-------------|----------------------|---------------------|------------------|
| 10/651,676 | 08/29/2003 | William G.F. Kelly | CHI-0869-CIP | 9313 |
| 27777 | 7590 | 07/13/2007 | EXAMINER | |
| PHILIP S. JOHNSON | | | COLE, ELIZABETH M | |
| JOHNSON & JOHNSON | | | | |
| ONE JOHNSON & JOHNSON PLAZA | | | ART UNIT | PAPER NUMBER |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | |
|------------------------------|-------------------------------|------------------|
| Office Action Summary | Application No. | Applicant(s) |
| | 10/651,676 | KELLY ET AL. |
| | Examiner Elizabeth M. Cole | Art Unit 1771 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on _____.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-16 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-16 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

| | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____. | 6) <input type="checkbox"/> Other: _____. |

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Langdon et al, U.S. Patent No. 5,500,270. Langdon discloses a laminate material. The first and second layers of the laminate material can be independently nonwoven webs, film, microporous sheets, porous sheets, etc. The first and second sheet can be apertured. See col. 3, lines 3-22. A plurality of spacer elements which correspond to the claimed projecting macrofeatures are disposed between and attached to the first and second layers. The spacers can either be adhesively or thermally bonded to the layers or can be cast as part of the layers. See col. 7, lines 1-16. For purposes of this rejection, the spacers will be construed as being integral with either the first or second sheet. The surfaces of the spacer will be construed as being the surface of the sheet at regions where the spaces occur. The first surface of the second layer will be the surface which is facing the first layer 42, the second surface of the second layer will be the opposite surface. Looking at figures 3 and 4, it is seen that the first and second layers each comprise first and second surfaces. The laminate material 40 comprises a first fluid pervious sheet or layer 42 and a second fluid pervious sheet or layer 46. The first and second fluid pervious sheets are provided with apertures 43 and 47. The apertures 47 originate in the first surface of the second layer 46 and extend in the

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direction of the second surface and terminate in the second plane. Since the claims do not specify that the second surface and the second plane are different, the second plane and the second surface are construed as being the same. The second layer 46 has a plurality of macrofeatures which are referred as spacer 48 which project from the second layer towards the first layer. Since the projecting elements are integral with the second layer and can be formed by casting the film so as to form the projections, the first surface of the second layer will be coincident with the first plane at the macrofeatures. The first layer 42 is in contact with the second layer 46 through the disconnected macrofeatures or spacers. Langdon teaches that the laminate material can be used as a topsheet for an absorbent article comprising an absorbent core and a backsheet. The macrofeatures of Langdon are not apertured and have a generally planar top surface. With regard to whether the first or second layer has the projecting features, since Langdon shows a two layered laminate and since either or both layer can be nonwoven or formed film, Langdon meets these limitations. Langdon differs from the claimed invention because Langdon does not disclose the size and pattern of the macrofeatures. However, Langdon teaches controlling the dimensions of the spacer elements, (or macrofeatures), so as to optimize the flow of fluids through the laminate material. Langdon teaches that the height, frequency and cross sectional area of the spacers determine the size of the capillary zone. See col. 3 lines 22-40 and col. 7, lines 55-66. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have selected the dimensions of the spacer

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elements through the process of routine experimentation in order to produce a laminate material having the optimum fluid flow properties.

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-16 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-4, 7-31, 35-45 of copending Application No. 10/366,051. Although the conflicting claims are not identical, they are not patentably distinct from each other because each discloses a two layered apertured structure having macrostructures which extend from one layer to the other layer, wherein both layers are fluid permeable.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

5. Applicant's amendment reciting that both layers are film layers is sufficient to overcome the rejection over Gregorian.

6. Applicant's arguments filed 4/20/07 have been fully considered but they are not persuasive. Applicant argues that Langdon teaches away from spacers having the claimed dimensions because Langdon teaches that the capillary zone should be about 0.003 inches while the instant claims recite that the maximum dimension of the spacers is at least 0.15 mm which is 0.0059 inches. However, initially, it is noted that the claims do not recite that the macrofeatures have a height of at least 0.15 mm but instead recites that the macrofeatures have a maximum dimension of at least 0.15 mm. The maximum dimension is not specified as a height, width, etc., in the claims and therefore could relate to the width, diameter, etc. of the macrofeature. Further, Langdon teaches that not only the height of the spacers, but also the frequency and cross section of the spacers control the final dimensions of the capillary zone. See col. 7, lines 55-63. Therefore, while Langdon does teach the capillary zone should have a size of about 0.003 inches, Langdon does not specify the dimensions of the spacers, but instead teaches controlling the height, frequency and cross section of the spacers in order to form a material having a capillary zone, which is indicated as number 50 in the drawings, having a size of 0.003 inches. Therefore, Langdon does not teach away from spacers having a maximum dimension of 0.15 mm, but instead teaches controlling the height, cross section and frequency of the spacers in order to arrive at capillary zones having a size of 0.003 inches. Therefore, the rejection is maintained. I

7. It is noted that claim 6 has an incorrect status identifier. It should have been designated as currently amended rather than previously presented.

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8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (571) 272-1475. The examiner may be reached between 6:30 AM and 6:00 PM Monday through Wednesday, and 6:30 AM and 2 PM on Thursday.

Mr. Terrel Morris, the examiner's supervisor, may be reached at (571) 272-1478.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

The fax number for all official faxes is (571) 273-8300.



Elizabeth M. Cole

Primary Examiner
Art Unit 1771

e.m.c.